84-1288

No. .....

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In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

vs.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES THOMAS JONES
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720
(208) 334-2400

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding it unethical for defendants in a civil rights class action to negotiate simultaneously a settlement on the merits with attorney's fees and costs.

2. Whether the court of appeals erred in failing to recognize the inherent and statutory power of district courts to prescribe ethical standards for attorneys appearing before them.

3. Whether, without finding an abuse of discretion, the court of appeals erred in reversing the district court's denial of attorney's fees under 42 U.S.C.A. §1988.

4. Whether the court of appeals has jurisdiction to vacate a post-judgment discovery order not appealed and not "fairly comprised" within the appealed order.

LIST OF PARTIES

Petitioner John V. Evans was sued in his official capacity as Governor and chief executive officer of the State of Idaho. Petitioner Rose Bowman is the successor in office to Milton G. Klein, sued in his official capacity as Director of the Idaho Department of Health and Welfare. Petitioner George Bachik was sued in his official capacity as Administrative director of State Hospital South, an administrative unit of the Department of Health and Welfare. Petitioner William Gruzinski is the successor in office to Carroll Elmore, sued in his official capacity as Clinical Director of State Hospital South. Although included in the caption before the Court of Appeals, Defendant Jerry Evans, State Superintendent of Public Instruction, was not a party to the orders appealed and is not a petitioner herein.

Respondents, Jeff D., Paula E., John M. and Dusty R., sued individually and on behalf of children who, because of mental illness, have been admitted to treatment facilities of the State of Idaho. As minors, suit is brought on their behalf by their next friend, Charles Johnson, III, who was also their counsel of record before the District Court and Court of Appeals.

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REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals vacating the District Court's denial of attorney's fees and costs is reported at 743 F.2d 648 (9th Cir. 1984). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on November 21, 1984. The Order of the District Court enlarging time to respond to discovery was vacated on November 6, 1984. A timely Second Petition for Rehearing and Suggestion for Rehearing *En Banc* regarding the discovery order was denied on December 6, 1984. All unpublished orders appear in the Appendix.

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JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §§1254(1) and 1651.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C.A. §1654 (1949):

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein."

42 U.S.C.A. §1988 (1982):

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the

Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

28 U.S.C.A. §1291 (1982):

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

28 U.S.C.A. §1292(a) (1982):

"The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

28 U.S.C.A. §1292(b) (1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Emphasis in original.

Rule 6(b), Federal Rules of Civil Procedure:

> "Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

Rule 23(e), Federal Rules of Civil Procedure:

> "Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Rule 3(c), Federal Rules of Appellate Procedure:

> "Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

Rule 8(a), Federal Rules of Appellate Procedure:

> "Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of

> appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action."

Rule 2-107, Local Rules of Practice for the United States District Court for the District of Idaho:

> "An attorney of record may bind his client in any steps of an action or proceeding, by a stipulation in writing filed with the Clerk, or by stipulation made in open court and entered upon the minutes of the court, and not otherwise."

Rule 2-109, Local Rules of Practice for the United States District Court for the District of Idaho:

> "The members of the bar of this Court shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho."

STATEMENT OF THE CASE

1. In the District Court.

This civil rights class action sought declaratory and injunctive relief on behalf of children who, because of mental illness, have been committed to Petitioner Bowman, Director of the Idaho Department of Health and Welfare. Invoking the District Court's jurisdiction pursuant to 28 U.S.C.A. §§1331 and 1343 and the doctrine of pendent jurisdiction, and stating claims under 42 U.S.C.A. §1983, Respondents sought an injunction prohibiting their admis-

sion to State Hospital South, a psychiatric hospital administered by Petitioners Bowman, Bachik and Gruzinski, the establishment of community based residential facilities for the provision of additional mental health services, and costs and attorney's fees pursuant to 42 U.S.C.A. §1988. The action also sought the provision of educational services resulting in a separate educational settlement with Defendant Jerry Evans which was not appealed and thus is not a part of this Petition. The education settlement contained a waiver of costs and attorney's fees such as that contained herein; as did the initial discussion drafts of the settlement herein prepared by Respondents.

Respondents claimed violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794, the Education for All Handicapped Children Act of 1975, 20 U.S.C.A. §1401, *et seq.;* the Developmental Disabilities and Bill of Rights Act, 42 U.S.C.A. §6020, *et seq.;* and certain Idaho constitutional and statutory provisions. The District Court granted partial summary judgment in favor of Petitioners as to all claims except those arising under the federal constitution and §§39-4600, *et seq.*, Idaho Code.

In September, 1982, the District Court certified the proceeding as a class action with respect to the mental health claims. The parties then engaged in settlement negotiations. Petitioners conditioned negotiations on the waiver of costs and attorney's fees. Counsel for Respondents asserted it was unethical to so negotiate. However, the parties agreed to submit the ethics question to the District Court for resolution, negotiated a settlement with a provision that both Respondents and Petitioners waived

"costs and attorney's fees thus far incurred, if so approved by the Court" and further stipulated that the settlement was to be tendered to the District Court for approval only if it concluded the practice was ethical.

On April 28, 1983, the District Court found the practice, ethical, and pursuant to Rule 23(e), F.R.C.P., approved the settlement. Respondents moved for costs, including attorney's fees. On May 6, 1983, the District Court denied the motion based, inter alia, upon the approved settlement and the prior proceedings in the case. Respondents then appealed the Order Denying All Costs of May 6, 1983.

While the matter was pending in the Court of Appeals, Respondents propounded certain interrogatories, requests for production and requests for admission. On October 22, 1984, the District Court granted Petitioners' Motion For Enlargement of Time to delay responding to the discovery while this matter was on appeal.

2. In the Court of Appeals.

The Court of Appeals framed the question to be decided:

> The question here is whether the court, in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorneys' fees simply because it was a part of the settlement to which the parties had agreed. *Jeff v. Evans,* 743 F.2d 648, 650 (9th Cir. 1984).

Without any factual basis in the record on appeal, the Court of Appeals found that Respondents were "prevailing parties" and entitled to an award of attorney's fees under 42 U.S.C.A. § 1988. 743 F.2d at 650. The Court of

Appeals, relying on the legislative history of 42 U.S.C.A. § 1988 and this Court's opinion in *Hensley v. Eckerhart*, — U.S. —, 76 L.Ed.2d 40 (1938) reasoned that the District Court was "obliged" to award attorney's fees. 743 F.2d at 651.

The Court of Appeals did not address whether the right to request attorney's fees and costs could be waived. Nor did it attempt to balance the congressional authorization of 28 U.S.C.A. § 1654 for District Courts to supervise the practice of attorneys admitted to practice before them with the 42 U.S.C.A. § 1988 incentive for civil rights actions in the form of awarding attorney's fees.

The Court of Appeals then "reversed and remanded for determination of reasonable attorney's fees." 743 F.2d at 652. It did not find that the District Court abused its discretion in denying the request for attorney's fees. Nor did it find that the District Court abused its discretion in approving the settlement. Rather, it voided the provision of the settlement waiving the right to claim fees, left the remainder of the settlement intact, and prohibited the District Court from exercising its discretion to determine whether Respondents are entitled to a reasonable attorney's fee.

While the main action was pending, Respondents submitted a Second Emergency Motion for Stay Pending Appeal to the Court of Appeals pursuant to Rule 8(a), Federal Rules of Appellate Procedure. Respondents did not appeal the Order Enlarging Time which was the subject of the Second Emergency Motion. Without discussion of whether the Second Emergency Motion was "fairly comprised" within or collateral to the appealed order, and without an appellate record, briefs and argument, the Court of Appeals "vacated" the Order Enlarging Time.

JURISDICTION OF THE DISTRICT COURT

The District Court's jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331 and 1343. Jurisdiction over the federal constitutional and statutory claims is not contested. However, upon remand, Petitioners will contest jurisdiction over the state constitutional and statutory claims under the doctrine of *Pennhurst v. Halderman*, — U.S. —, 79 L.Ed.2d 67 (1984).

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REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with applicable decisions of this Court.

Although this Court has not yet decided the question whether parties in a civil rights action may simultaneously negotiate a settlement on the merits with the issue of attorney's fees and costs, recent decisions of this Court have recognized (1) the right of the parties to settle civil rights class actions on mutually agreeable terms; (2) the power of district courts to resolve ethical issues involved in the simultaneous negotiation of fees with the merits of an action; and (3) the power of district courts to deny attorney's fees in appropriate circumstances.

In *Carson v. American Brands*, 450 U.S. 79 (1981), an employment discrimination class action, this Court recognized that the parties have the "right to compromise their dispute on mutually agreeable terms." 450 U.S. at 88. In the present action, two stipulations involved. In the first, the parties conditionally tendered the negotiated settlement to the District Court for review and approval only if it found the waiver for fees ethically acceptable. In the second, they agreed to settle the case on various terms, one of which was the waiver of attorney's fees and costs. The decision of the Court of Appeals would force the parties to settle on terms to which Petitioners had not

agreed and ignores their first stipulation in which the settlement was conditionally tendered for approval. Further, the *Carson* opinion expressly recognizes:

> Settlement agreements may thus be predicated on an express or miplied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation. 450 U.S. at 87.

This Court has declined adoption of a *per se* rule prohibiting the simultaneous negotiation of attorney's fees with the merits of the action. Rather, this Court suggested a case-by-case resolution of the issue. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court recognized that the discretion afforded district courts by 42 U.S.C.A. § 1988 would "support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party." 455 U.S. at 454. Petitioners urge that the present case is squarely within the scope of *White*. The District Court denied fees based upon the previous stipulation which it had approved. The decision of the Court of Appeals would reform the settlement agreement and eliminate Respondent's only substantive promise. Thus, the only way to avoid "unfair surprise and prejudice" would be to vacate the Court of Appeals' decision and either affirm the District Court's decision or allow the parties to return to the bargaining table. This result is consistent with 28 U.S.C.A. § 1654 authorizing District Courts to proscribe standards of professional practice for attorneys appearing before them.

Similarly, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), this Court recognized that there is no right to attorney's fees if an award would be "unjust." One lower court has suggested it would be "unjust" to award attorney's fees if the claimant misled the other party. *Chicano Police Officer's Association v.*

Stover, 624 F.2d 127 (10th Cir. 1980). A similar circumstance is present in this case: Petitioners negotiated and settled the case with the expectation that Respondents would not ask for attorney's fees. The Court of Appeals would force a settlement to which the parties have not agreed.

In *Hensley v. Eckerhart,* — U.S. —, 76 L.Ed.2d 40 (1983), this Court ruled that district courts have discretion to award attorney's fees under 42 U.S.C.A. § 1988. Indeed the statute expressly so provides. However, the Court of Appeals did not remand the matter for a determination of whether Respondents are prevailing parties or otherwise entitled to fees (Petitioners vigorously assert, under the particular circumstances of this case, that they are not but would be denied the opportunity to present their position to the District Court) and, if so, the amount of a reasonable fee. Rather, the Court of Appeals remanded the action "for determination of reasonable attorney's fees." 743 F.2d at 652. The Court of Appeals did not conclude that the District Court abused its discretion; rather, it would afford the District Court no discretion in the matter.

This Court has long recognized the authority of an attorney at law to act on behalf of a party, even without the express consent of the party, and thereby protected opposing parties dealing with the attorney at law. *Holker v. Parker,* 11 U.S. (7 Cranch) 436 (1813) (Unauthorized submission to arbitration enforced); *Stowe v. United States,* 86 U.S. (19 Wall.) 13 (1873) (Party estopped to deny court approved settlement); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824) (Corporation bound by acts of attorneys); *Rogers v. The Marshall,*

68 U.S. (1 Wall.) 644 (1863) (Client bound by instructions of attorney to third person); *Halliday v. Stuart*, 151 U.S. 229 (1893) (Third party may rely on attorney's settlement). However, implicit in the Court of Appeals' decision is the conclusion that an attorney's waiver of fees, even in a case where the attorney is legally authorized to consent for the client, is ineffective.

This Court allows parties to waive fundamental constitutional rights, such as the rights to counsel, jury trials and confrontation. *Boykin v. Alabama*, 395 U.S. 238 (1969). However, the decision below refuses to allow an attorney and next friend to waive the statutory right to request attorney's fees. Thus, the Court of Appeals would allow civil rights plaintiffs to invite defendants to the bargaining table with the hope of waiving fees and even with a promise to waive fees in return for settlement and then allow the one substantive provision of value to the defendants to be excised, while leaving the remainder of the "agreement" intact.

2. The decision below conflicts with the decision of other courts of appeals.

The Courts of Appeal for the First and Eighth Circuits have approved the simultaneous negotiation of the merits and fees. *Grunin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975) cert. den. 423 U.S. 864; *White v. New Hampshire Department of Employment Security*, 629 F.2d 697, 705 (1st Cir. 1980) (rev'd on other grounds 455 U.S. 445). Similarly, the Sixth, Eighth and Tenth Circuits would allow civil rights plaintiffs to waive the claim for attorney's fees. The decision of the United States Court of Appeals for the Ninth Circuit conflicts with the decisions of these circuits.

In *Young v. Powell*, 729 F.23d 563 (8th Cir. 1984), the parties entered into a settlement of an employment discrimination class action resulting in the action's dismissal with prejudice. Thereafter plaintiffs moved for fees under 42 U.S.C.A. § 1988. The Eighth Circuit reasoned that waiver of the right to claim fees could be inferred from the parties' stipulated dismissal of the action. It said:

> Furthermore, we have carefully examined the record and have found no indication that the stipulation of settlement and dismissal was entered into as a result of fraud, misconduct of the defendants, mutual mistake, or any other reason that might justify modification or reformation of the settlement or relief from the order and judgment of dismissal. There is no reason offered why the parties should not be bound by their agreement under basic principles of contract. 729 F.2d at 566-567.

Similarly, in *Jennings v. Metropolitan Government of Nashville*, 715 F.2d 1111 (6th Cir. 1983), an individual civil rights action under the Civil Rights Act of 1870, 42 U.S.C.A. § 1981, the parties settled and dismissed the action with prejudice without addressing fees. The Court enforced the intention of the parties to resolve the matter fully which "therefore, precludes a subsequent award of attorneys' fees against them." 715 F.2d at 1114.

Both the *Young* and *Jennings* courts allow parties to waive attorney's fees and imply waiver from dismissals with prejudice. Not only would the Court of Appeals herein prohibit the parties to waive fees, but also would ignore their express waiver.

In *Chicano Police Officer's Association v. Stover*, 624 F.2d 127 (10th Cir. 1980), the Court decided that 42

U.S.C.A. § 1988 does not prohibit the waiver of fees as a part of settlement. In remanding the case, the Court said:

> The settlement agreement here is at best ambiguous; the $16,000 payment could be construed as a settlement of all that is to be paid to plaintiffs *and their attorneys*. That is one of the questions to be determined on remand. The trial judge should conduct an evidentiary hearing on whether attorneys' fees were discussed and intended to be covered by the cash settlement. If not, the court should consider whether plaintiffs took actions to mislead defendant or otherwise were responsible for "special circumstances" which would make an attorneys' fees award in their favor inequitable under the *Piggie Park* standard. 624 F.2d at 132 (emphasis in original.)

Finally, in a prior case, the Ninth Circuit held that the claim for fees was personal to the attorney and not a claim of the client. *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). Implicit in its holding in the present case is that clients acting through their next friend may not waive the attorney's right to claim fees. This is in direct conflict with the decision of the Second Circuit, in which the Court said:

> The entitlement of an attorney to fees depends upon the contractual arrangement between the attorney and client. The parties to these arrangements may well take into account the possibility of a court award of fees where statutory authority such as Section 1988 exists but a claim for such an award must itself be made by the party rather than the attorney.
>
> Section 1988's direction that fees may be awarded to "the prevailing party" is plain enough and absent evidence of a contrary congressional intent (which has not been provided), is dispositive. However, there are additional compelling reasons to reject Davis' argument. Where an attorney and client have

> independent entitlements in the same action a conflict of interest is created. Defense counsel will agree only to settlements which satisfy the attorney as well as the client. A client willing to settle for $5,000 will be thwarted if his or her attorney asserts a further right to $30,000 from the defendant. There is simply no reason to believe that Congress intended to diminish substantially the attorney's duty of undivided loyalty to his or her client. *Brown v. General Motors Corp. Chevrolet Division*, 722 F.2d 1009, 1011 (2d Cir. 1983).

The Court of Appeals herein would not allow a client to waive the claim for fees and costs, in conflict with *Brown*. Worse, by allowing the claim for fees to be that of the attorney, the Ninth Circuit creates the very conflict which it then seeks to avoid at the expense of the opposing parties. The ethics of this dilemma are more fully discussed in the following section.

3. The decision below raises important questions of federal law which have not been but should be decided by this Court.

This Court has not yet ruled on the specific question of whether it is ethical to condition settlements on the waiver of attorney's fees and costs. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 453, fn. 5 (1982), this Court declined to so rule.

The questions presented go to the very heart of an attorney's relationship with a client—especially an attorney seeking reform of public institutions, the relationship between opposing attorneys, and the power of a district court to regulate the conduct of its judicial business.

This Court has recognized that attorneys serve both their clients and the courts before whom they appear.

Polk County v. Dodson, 454 U.S. 312 (1981). This dual role would become unmanageable if affected by the attorney's personal or financial interests. Thus, an attorney's financial interests are secondary to the primary duties to court and client. *Theard v. United States,* 354 U.S. 278 (1956).

This policy is reflected in both traditional[1] and contemporary[2] standards of professional practice. These standards require an attorney to protect faithfully, competently and zealously the client's interests. *Model Code,* Canon 7; *Model Rules,* Rule 1. They prohibit both an attorney's own interests and those of third parties from compromising the primary duty of loyalty to the client. *Model Code,* Ethical Considerations 5-2 to 5-24; *Model Rules,* 1.7(b), 1.8(f)(2) and 5.4(c). They recognize that the decision to accept an offer of settlement is that of the client, not that of the attorney. *Model Code,* Ethical Consideration 7-7 and 7-8; *Model Rules,* Rule 1.2(a). Both prohibit an attorney from acquiring an interest in the litigation. *Model Code,* Disciplinary Rule 5-103(a); *Model Rules,* Rule 1.8(j). Both require an attorney in a position of possibly violating a standard to withdraw from representation. *Model Code,* Disciplinary Rule 2-110(b); *Model*

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[1]American Bar Association: *Model Code of Professional Responsibility* (1981) (hereinafter "Model Code"). By rule, the District Court adopted the Model Code and the Code of Professional Ethics promulgated by the Idaho Supreme Court as the standards of practice for attorneys before it. Local Rule 2-109, Local Rules of Practice for the United States District Court for the District of Idaho. The Code of Professional Ethics is based on the Model Code.

[2]American Bar Association: *Model Rules of Professional Conduct* (1983) (hereinafter "Model Rules").

Rule, 1.16. The decision below cannot be reconciled with these accepted standards of professional practice.

Instead, the Court of Appeals has established its own set of professional standards contrary to the congressional authorization for district courts to prescribe standards of professional practice. 28 U.S.C.A. § 1654 (1949). In a previous case, it held that a claim for attorney's fees under 42 U.S.C.A. § 1988 is that of the attorney and not that of the client. *Brandenburger v. Thompson,* 494 F.2d 885 (9th Cir. 1974). Thus, the Ninth Circuit allows attorneys to acquire financial interests in civil rights actions, again contrary to accepted standards of professional practice. In the present case, the Ninth Circuit ruled that the district court erred in denying the attorney's request for fees, even though previously waived by the clients through their next friend and attorney. In so doing, it would allow third parties (in this case, the organization employing Respondents' counsel which conditioned funding on non-waiver of fees) to limit the independent professional judgment so dearly held by attorneys and carefully nurtured by this Court. Thus, the Court of Appeals would avoid a conflict between counsel and funding sources at the expense of the clients' interests.

In so doing, the Court of Appeals implies that the dilemma presented herein (i.e., should the attorney accept a settlement favorable to the client at the expense of financial reimbursement to the employer) is somehow novel. Yet attorneys routinely, and properly, accept cases with fees contingent on recovery. These are routinely settled by a single dollar figure, the allocation of which is a private matter between attorney and client. In civil

cases, the defendant's main concern is the total liability, not the allocation of funds. Similarly, criminal cases are negotiated by guilty pleas, even though the defense attorney paid on an hourly rate earns less than if the matter is tried. While contingency fee cases and criminal cases are different from civil rights actions seeking injunctive relief, they have a common ingredient: an attorney may not allow personal interests, whether in the form of a certain recovery in a contingency matter, increased billable hours, or funding restrictions, to influence the client's decision to accept a settlement.

Nor is the dilemma limited to settlements. An attorney who is allowed to become financially interested in the case is encouraged to bring actions, such as civil rights actions, in which an award of fees is authorized rather than an action, such as habeas corpus,[3] wherein the relief, although limited in scope, may be more congruent with the client's interests. This is typical in the "reform" litigation in which the attorney's social goals are allowed to influence the course of the litigation.

An attorney's professional judgment may be influenced by a number of factors, from career development and reputation among peers to potential clients and funding sources. Institutional reform cases often generate new cases, funding from donors and peer esteem. However, if such factors affect the attorney's judgment, it is no longer "independent": the client's interests in settlement become secondary to the attorney's reform agenda.

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[3]42 U.S.C.A. § 1988 is limited to actions under 42 U.S.C.A. §§ 1981, 1982, 1983, 1985 and 1986, Title IX of Public Law 92-318 and Title VI of the Civil Rights Act of 1964.

The attorney is no longer "professional" and our judicial system's reliance on a professional bar is diminished.

The *Model Rules* recognize the dilemma by authorizing an attorney to discuss moral or social implications with a client. *Model Rules,* Rule 2.1. However, they remain rigid: the decision to accept the settlement offer is the client's, and the attorney must withdraw from representation if he or she can no longer represent the client's interests. *Model Rules,* Rules 1.2, 1.7(b) and 1.16. The dilemma which the Court of Appeals created in *Brandenburger* is exacerbated in cases such as the present one, in which the clients are not legally competent to contract and suit is brought by their next friend who is also the attorney of record who is claiming fees.

District Courts, if the Court of Appeals' decision stands, are placed in a similar dilemma. Rule 23(e), F.R.C.P., requires them to approve class action settlements. In performing this function, the Court assumes a protective role ensuring that unnamed class members and, in this case, incompetent class members, are adequately protected.[4] If, as the Court of Appeals suggests, parties should not address the question of fees, the District Court's task of protecting class members is hindered because, as any attorney knows, more relief would be available if all issues, including the amount of fees are addressed. Even in cases of injunctive relief, services

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[4]*Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970), cert. den., 401 U.S. 912. Although the present class was certified under Rule 23(b) (2), F.R.C.P., and notice to class members was not required, in other class actions, any meaningful notice of a pending settlement must include promises regarding fees. *Manual for Complex Litigation,* § 1.45 (1981).

required have a cost and fewer services will be agreed to if fees are unliquidated. If the District Court must be kept unaware of the existence of a favorable collateral agreement on fees it cannot recognize a less favorable settlement on the merits. In all cases the District Court will be unable to evaluate the fairness of the total agreement. Further, requiring separate proceedings for approval of the relief and fees unnecessarily increases the workload of the district courts.

Finally, prohibiting concurrent discussion of substantive relief and fees hamstrings defense attorneys who are routinely directed at pretrial conferences to explore settlement. They must advise their clients of all potential liability and that any settlement of the merits is independent of the unresolved claim for attorney's fees. Further, to justify their actions through the discovery stage, they might well overstate the chances of success at trial which would negate the claim for fees. Moreover, if they are ethically prohibited from mentioning the fees issue to plaintiff counsel and the defendant rejects a reasonable settlement offer because of the unresolved claim for fees, defense consel would be prohibited from conveying the real reason for the offer's rejection.

Most lawsuits are resolved by settlement. Indeed, the facilitation of settlement is a strong congressional and judicial goal. The uncertainty of trials and wasted judicial time are avoided. *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines*, 573 F.2d 960 (7th Cir. 1978), cert. den., 439 U.S. 876. In most cases, plaintiff counsel are asked to waive their fees. 68 A.B.A. Journal 23 (1982). It might well be that plaintiff counsel

may want to put the claim for fees on the bargaining table in exchange for added relief. Reversal of the Court of Appeals would allow counsel to exercise independent judgment on behalf of their clients, evaluate the probability and extent of relief after trial and adopt a settlement strategy calculated to achieve the client's goals.

4. The decision below departs from the accepted and usual course of judicial proceedings calling for an exercise of this Court's supervisory powers.

Respondents appealed the District Court's Order denying all costs dated May 6, 1983. Respondents did not appeal the October 22, 1984 Order of the District Court enlarging the time in which to respond to discovery. As the two orders are two discrete exercises of judicial power by the District Court, the post-settlement discovery order cannot be "fairly comprised" within the May 6, 1983 Order. Thus, the Court of Appeals should not have "vacated" the order without stating the reasons for its decision and without concluding that the District Court abused its discretion authorized by Rule 6(b), F.R.C.P.

Moreover, generally accepted appellate practice allows briefing, oral argument and an appellate record before an order is vacated. As with the attorney's fees issue, if District Courts have discretion, then reversal requires a finding that the discretion had been abused. This is not a case in which the defendants extracted a waiver of fees in exchange for less relief to the class than that demanded in the Complaint. Rather, in light of the expectation of avoiding financial liability in the form of attorney's fees, Petitioners bargained and ultimately agreed to relief broader in scope and more beneficial to

the class over the term of the settlement than that demanded in the Complaint.

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CONCLUSION

This case squarely presents the issue whether parties in a civil rights class action may simultaneously negotiate a settlement concurrently with the issues of attorney's fees and costs. This is not a case presenting questions of fraud, mistake or excusable neglect authorizing amendment to the court approved settlement.

Similarly, this is not a case in which the negotiations included overreaching or any improper negotiating practices. Rather, the negotiations in this case included open discussion and bargaining on all issues. Reversal of the Court of Appeals would not inhibit district courts from exercising their Rule 23, F.R.C.P., duty to review the fairness of settlements presented for their approval. To the contrary, reversal would enable district courts to perform this function better and more meaningfully, since all items of relief would be before them at one time.

This is not a case in which reversal of the Court of Appeals will have a chilling effect on civil rights actions. Most actions, including civil rights actions, are settled short of trial. Reversal of the Court of Appeals would allow the parties to negotiate all issues in the action and avoid all-or-nothing risk of trial.

Similarly, reversal of the Court of Appeals will not frustrate the Congressional policy embodied in 42

U.S.C.A. § 1988 of allowing awards of attorney's fees and thereby encouraging civil rights actions. A claim for fees is a valuable bargaining chip which plaintiff counsel may well wish to employ to obtain more or different relief on behalf of the class members.

In this case this Court is asked to balance the Congressional incentive for civil rights actions with the Congressional authorization to District Courts to conduct their judicial business and thereby enable parties in civil rights actions to resolve cases fully and fairly by negotiated settlement.

The question whether the parties to a civil rights class action may waive their right to claim attorney's fees during settlement negotiations is recurring, fundamental and requires resolution by a single rule of national application. It should be resolved by this Court and the Decision of the Court of Appeals should be reversed.

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ James Thomas Jones
Attorney General
Statehouse
Boise, Idaho 83720
(208) 334-2400

Counsel for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION SETTLING MENTAL HEALTH CLAIMS and ORDER
(Filed April 28, 1983)

Plaintiffs and Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore (hereinafter: "defendants"), through their respective counsel of record, hereby stipulate to settle the remaining mental health claims upon the following terms:

I

Plaintiffs have the right to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, with the goal of providing them the opportunity to develop their full potential.

Defendants have the duty, so far as possible, through procedures, agreements, contracts and policies, of ensuring an available, accessible continuum of alternative community-based treatment facilities and residential programs providing mental health services to plaintiffs in the setting least restrictive of personal liberty on a statewide basis.

II

To achieve the goals of Division I, above, defendants shall:

1. Undertake on an annual basis a program of planning for the service programs administered by the Division of Community Rehabilitation of the Idaho Department of Health and Welfare, including Community Mental Health, Adult and Child Development and Institutional programs. Each individual planning effort shall be coordinated with the others and shall assess the needs of plaintiffs within each program, identify services and facilities which need to be developed or modified to address such needs, and establish an implementation plan of priorities and resouces available or required to satisfy such needs. A copy of all such plans shall be submitted to counsel for plaintiffs.

2. With all deliberate speed, seek to establish such facilities and programs identified as necessary and appropriate under Paragraph II(1) for the povision of mental health services to plaintiffs in the most normal living conditions in Idaho.

3. The organizational unit(s) of the Idaho Department of Health and Welfare having programatic responsibility for services to plaintiffs shall annually submit a

legislative budget request for funds for the operation of community-based treatment facilities and residential programs and the development of such additional facilities and programs identified as necessary and appropriate under Paragraph II(1) to serve the needs of plaintiffs. Until such time as other private or governmental agencies develop and operate community facilities and programs sufficient to meet the needs of plaintiffs identified under Paragraph II(1), defendants shall accept responsibility for the development and operation, within the limits of resources of or available to defendants, either directly or in conjunction with other providers, of such facilities and programs.

4. Defendants shall prohibit the admission of plaintiffs to any psychiatrict treatment unit of the Idaho Department of Health and Welfare where there is contact as to living and sleeping arrangements with adult mental patients, provided that plaintiffs in the following circumstances may be so admitted (subject to the protections in Paragraph II(5)):

4a. Judicial proceedings for the involuntary commitment of a plaintiff have been commenced under Section 66-329, Idaho Code, and (i) the court in such proceedings enters an order for temporary detention under Section 66-329(e), Idaho Code, (ii) the court in such proceedings determines that admission to such a facility is necessary for the protection of the plaintiff, (iii) no less restrictive alternate facility is available to the court or appropriate under the circumstances, and (iv) the admission under this exception does not extend past the time the plaintiff is dispositioned to an appropriate treatment facility or dismissal of the proceedings; or

4b. Jurisdiction under the Youth Rehabilitation Act has been waived pursuant to Sections 16-1806 or 16-1806A, Idaho Code, the plaintiff has been charged with a criminal offense and proceeded against as an adult, and is committed pursuant to Section 18-211 or 18-212, Idaho Code; or

4c. The plaintiff suffers from a mental disorder which, in the opinion of a psychiatrist, is amenable to treatment at such facility, such facility is closer to the plaintiff's home than another appropriate, available facility, and such admission does not extend for more than forty-five (45) days; or

4d. The plaintiff has been committed pursuant to Section 66-329, Idaho Code, has a history of placements in more than one residential facility with a program of services designed for children or adolescents and such placement has not benefited the plaintiff or no other appropriate facility is available and such admission does not extend for more than forty-five (45) days, provided that such admission may continue for one (1) additional forty-five (45) day period for the purpose of placement in an alternate facility; or

4e. The Idaho Department of Health and Welfare develops a psychiatric treatment unit for plaintiffs in which plaintiffs are separated from adult mental patients with respect to living and sleeping arrangements.

5. The exceptions of Paragraph II(4) notwithstanding, (i) no plaintiffs under the age of fourteen (14) years may be admitted under exceptions II(4)(a), (b), (c) or (d) to any such facility; and (ii) nor may any plaintiff be placed on a unit with an adult mental patient with a history of sexual activity as an adult with a minor.

6. The Idaho Department of Health and Welfare shall organize and utilize an interdisciplinary intra-agency committee composed of representatives of its mental health, developmental disabilities, social services and field operations programs to review the proposed admission of plaintiffs to any phychiatric treatment unit of said Department where there is contact with respect to living and sleeping arrangements with adult mental patients under exception II(4)(d). The committee shall review the proposed admission, alternative placements, the plaintiff's need for inpatient care and determine that such admission is the most appropriate available placement for such plaintiff.

7. The Administrative Director of any psychiatric treatment unit of the Idaho Department of Health and Welfare in which there is contact with respect to living and sleeping arrangements with adult mental patients shall notify counsel for plaintiffs or his successor as reflected in the records of the above-entitled action of the admission of each plaintiff under exceptions II(4)(a), (c), or (d) and extension of any admission under II(4)(d). The notification shall include the plaintiff's name and date of birth, the name and address of the plaintiff's parent(s), guardian(s) or other person(s) acting in loco parentis, other facilities considered prior to such admission and the name and address of the official to contact concerning the admission.

8. All placements of plaintiffs shall be in the environment least restrictive of personal liberty in which appropriate services can be provided with a preference for (i) placement in the plaintiff's home and (ii) placement in a psychiatic treatment unit in which there is con-

tact with respect to living and sleeping arrangements with adult mental patients only after all other appropriate placements have been attempted or considered and rejected.

9. The defendants shall provide plaintiffs with appropriately prescribed mental health services according to each plaintiff's individual treatment plan, including, where appropriate, diagnosis, evaluation, therapy and counselling. Service and decisions concerning services shall be provided or made by professions qualified by education, training or experience to make the particular decision or provide the particular service involved. Treatment decisions concerning plaintiffs admitted to a psychiatric treatment unit of the Idaho Department of Health and Welfare must be made by professionals experienced in providing such services or making such decisions in the psychiatric setting; provided that day-to-day decisions regarding the care of such plaintiffs—including decisions that must be made without delay—may be made by other persons if such other persons are subject to the direct supervision of a qualified professional and each such decision is reviewed by a qualified professional.

10. For each plaintiff, defendants shall develop an individualized treatment or service plan, which, in the case of plaintiffs admitted to an inpatient psychiatric treatment unit, shall meet the requirements of "Rules Governing Hospitals", Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

11. Defendants shall provide adequate psychiatric, psychological or other counseling and programming, as considered appropriate in light of each plaintiff's individual treatment plan, including at least five (5) hours of therapy or other direct services per week.

12. In developing and implementing the individual treatment plans, defendants shall include the least possible reliance on medications appropriate under the circumstances.

13. The Administrative Directors of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall keep records containing a description of any extraordinary incidents (including sexual incident, physical attacks, threats or accident) in such facility involving any plaintiff. Each report must be prepared by a staff member noting personal knowledge of the incident or other source of information. The Administrative Director shall investigate each report. Modifications to the individual treatment plan of each plaintiff involved in each such report must be considered following verification of a report.

14. Upon verification of an incident report, the Administrative Director of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall take the necessary stepts to protect such plaintiff from recurrence of such incident.

15. With respect to plaintiffs admitted to an inpatient psychiatric treatment unit, other than one of the Idaho Deparment of Health and Welfare, in which there is contact with respect to living and sleeping arrangements with adult mental patients, an employee of such Department shall be responsible for the monitoring of the care and progress of each such plaintiff. In preparing reports regarding such plaintiff, either pursuant to Paragraph II(20) below or Section 66-337, Idaho Code, such employee shall review all extraordinary incidents (including sexual incidents, physical attacks, threats or accidents) involving the plaintiff, include a description of

any such incident in such report, consider modifications to the plaintiff's treatment or service plan or a change in placement as may be necessary to protect such plaintiff from recurrance of such incident.

16. The individual treatment plan of each plaintiff admitted to a psychiatric unit of the Idaho Department of Health and Welfare shall be developed upon admission and reviewed as needed but at least once every six (6) months or upon verification of an incident report. The review shall be conducted either by the facility's quality assurance committee, which committee must include at least one (1) qualified professional with at least two (2) years' clinical experience in the treatment of children or adolescents, or by an interdisciplinary committee appointed by and reporting to the Administrative Director, the members of which committee must have at least two (2) years' clinical experience in the treatment of children or adolescents.

17. In the event any plaintiff admitted under the exceptions contained in Paragraph II(4) has exhausted the programs and treatment resources available through the Idaho Department of Health and Welfare and such plaintiff's clinical condition does not improve or deteriorates in any six (6) month period, the Administrative Director of the facility shall refer such plaintiff to a licensed psychologist or psychiatrist specializing in children's or adolescent's treatment or such other professional specializing in an area appropriate to such plaintiff's condition for additional case consultation.

18. Each individual treatment or service plan contain a placement assessment. The placement assessment

must identify the least restrictive environment most capable of meeting the needs and capabilities of such plaintiff. If the plaintiff is not placed in such environment, the plan must reflect why the plaintiff was not so placed.

19. Each individual treatment plan of a plaintiff admitted to an inpatient treatment facility must include a discharge plan. The discharge plan must include a projected date for the transfer, release or discharge from such facility and the programming necessary to achieve such result.

20. The parent(s), guardian(s) or other person(s) acting in loco parentis of each plaintiff must be notified on at least a semi-annual basis of their plaintiff's vocational, social, living skills, progress and clinical condition.

21. State Hospital North, State Hospital South, and any other inpatient psychiatric treatment unit of the Idaho Deparment of Health and Welfare shall establish in consultation with plaintiffs' counsel (see below) and implement a patient grievance procedure. Such procedure shall be available to each plaintiff and his or her parent(s), guardian(s) or other person(s) acting in loco parentis, and provide a method for the plaintiff or such other person to disagree with the individual treatment plan or its implementation.

22. Each plaintiff's individual treatment plan must be separate from and coordinated with such plaintiff's individual education plan.

23. At least once each year so long as the court retains jurisdiction of this matter, counsel for plaintiffs, counsel for defendants and the Administrator of the Division of Community Rehabilitation of the Idaho Department of Health and Welfare shall meet and confer con-

cerning defendants' implementation of this Stipulation and any other items of conern to plaintiffs.

24. The court may retain jurisdiction over this matter for five (5) years or until satisfied by stipulation or otherwise that the claims for relief as alleged in the Complaint herein have been adequately addressed.

25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court.

26. This Stipulation may be merged into a judgment of the court fully resolving the above-entitled action.

DATED this — day of March, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for Health and
Welfare Defendants

Welfare

DATED this — day of March, 1983.

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for Defendant
John V. Evans

DATED this — day of March, 1983.

/s/ L. Charles Johnson, III
Attorney for Plaintiffs

ORDER

IT IS SO ORDERED.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER DENYING ALL COSTS
(Filed May 11, 1983)

The above-entitled matter came on for hearing on April 28, 1983, in Pocatello, Idaho, on plaintiffs' motion for consideration of costs and attorney fees on settlement in the above-entitled action. This action was settled by a stipulation, settling mental health claims, which was approved by (and became the order of) this Court on April 28, 1983. The stipulation provided that each party "shall bear their own costs and attorney fees thus far incurred, if so approved by the court."

For good cause shown, and based on the Stipulation Settling Mental Health Claims, and the other pleadings, documents and papers on file in this matter, and for the further reasons stated at the hearing on the motion for

attorneys fees, IT IS ORDERED that the plaintiffs' motion for consideration of costs and attorney fees on settlement be, and the same is hereby, DENIED.

DATED this 6th day of May, 1983.

/s/ Marion J. Callister, Chief Judge
United States District Court

Charles Johnson, III
JOHNSON AND OLSON, CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204
Telephone: (208) 232-7926

Lawyer for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OR IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

NOTICE OF APPEAL
(Filed May 31, 1983)

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the "Order Denying All Costs" in this action dated May 6, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

Lawyer for Plaintiff

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true and correct copy of the foregoing to the attorneys of record herein, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
Deputy Attorney General
Legal Services Division
Department of Health and Welfare
450 West State - 7th Floor
Boise, Idaho 83720

Thomas Frost, Esquire
450 West State
7th Floor
Boise, Idaho 83720

on this 23rd day of May, 1983.

/s/ Charles Johnson
Licensed Lawyer

JAMES WICKHAM
Deputy Attorney General
Legal Services Division
Department of Health and Welfare
450 West State - 7th Floor
Boise, Idaho 83720
(208) 334-4006

THOMAS C. FROST
Deputy Attorney General
Office of the Attorney General
Statehouse
Boise, Idaho 83720
(208) 334-2400

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER
(Filed August 12, 1983)

The parties having stipulated to resolve the remaining mental health claims, having further stipulated that should the Court conclude that it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorneys fees and costs concurrently with the merits of the claims that the stipulation would be tendered for consideratiaon by the Court with a waiver provision, and the Court having concluded that the practice is ethical, having approved the settlement stipulation and having denied the plaintiffs' request for attorney's fees and costs and the plaintiffs' having appealed said denial, and it appearing to the court that suspension of the stipulation pending appeal is necessary to preserve the expectations of the parties while the appeal is pending;

IT IS HEREBY ORDERED that Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 be and the same are hereby suspended while said appeal is pending.

DATED this 10th day of August, 1983.

/s/ Marion J. Callister
District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091
MJC

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

OPINION
(Filed September 20, 1984)

Appeal from the United States District Court
for the District of Idaho

Marion J. Callister, District Judge, Presiding
Argued and submitted March 8, 1984

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

This is an appeal from an order denying attorney's fees in a 42 U.S.C. § 1983 class action to improve conditions of mentally and emotionally handicapped children institutionalized by the State of Idaho. The attorney's fee application followed a settlement agreement in which the

defendants agreed to institutional improvements favorable to the interests of the class, but declined to bear any of plaintiffs' attorney's fees. This appeal as to the enforceability of the settlement's provision on attorney's fees is an example of problems that have arisen when class action settlement negotiations have been undertaken in conjunction with negotiation of attorney's fees. The order denying the fees is a final order and we have jurisdiction under 28 U.S.C. § 1291. *Brandenburger v. Thompson*, 494 F.2d 885, 887-88 n.2 (9th Cir. 1974).

The settlement negotiations in question began some two and one-half years after filing of the suit—after settlement of other claims, extensive discovery and certification of a class of handicapped, institutionalized children. In the merits of the action, the class alleged infringement of constitutional rights and sought compliance with federal and state rehabilitation and education laws.[1] During the negotiations, the defendants offered virtually all of the injunctive relief plaintiffs had sought, and more than the district court during earlier hearings had indicated it was willing to grant. However, defense counsel stated during the negotiations that defendants' agreement was conditioned upon the plaintiffs' counsel's waiver of attorney's fees. Plaintiffs' counsel at that time was employed by a public interest law firm, which had instructed him not to waive fees.

Aware of his ethical obligation to accept this favorable settlement on behalf of his clients, but unhappy with the prospect of foregoing the attorney's fees to which

he believed 42 U.S.C. § 1988 entitled him, plaintiffs' counsel negotiated a condition on the waiver of fees: approval by the district court. The district court approved the settlement on the merits and, then, upon plaintiffs' filing of a motion for attorney's fees, denied fees based upon the stipulation.

In this appeal, the defendants do not maintain that there is any basis, apart from the stipulation, for the denial of attorney's fees. Section 1988 of Title 42 authorizes award of attorney's fees to the prevailing parties in civil rights actions of this nature. "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

There is no question that the plaintiffs are prevailing parties by virtue of the settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S. Ct. 2570, 2575, 65 L. Ed. 2d 653 (1980). Nor is there any question that plaintiffs' counsel, under ordinary application of section 1988, is deserving of an award of reasonable attorney's fees. *See, e.g., Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937-38 (1983) (section 1983 plaintiff entitled to attorney's fees in proportion to success achieved). The defendants' only contention is that the appellants should be bound by the stipulation waiving fees. Defendants point out that although this court has disapproved the practice of simultaneous negotiation of attorney's fees and settlement of the merits of the lawsuit, we have not categorically declared the practice unethical. *See Mendoza v. United States*, 623

F.2d 1338, 1353 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

Defendants rely upon the general principle that parties, and their lawyers, are bound by their stipulations. *See, e.g., Herman v. Eagle Star Insurance Co.,* 396 F.2d 427 (1968) (court need not examine evidence for reliability if parties have stipulated to it). Defendants correctly assert that plaintiffs' counsel did indicate willingness to forego fees if the court approved.

The principle that generally binds lawyers and litigants to stipulations has limited applicability in the present situation, however. The question here is whether the court, in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorney's fees simply because it was part of the settlement to which the parties had agreed. We answer the question in the negative, because the court has a duty to review the reasonableness of all the terms of class action settlement agreements, particularly those related to attorney's fees. *See* Fed. R. Civ. P. 23(e); C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1797, 1803 (1972). Moreover, this general duty in class action settlements is reinforced by the clear public policy of 42 U.S.C. § 1988 to award reasonable attorney's fees in civil rights actions. *See Hensley v. Eckerhart,* 103 S. Ct. at 1937.

Rule 23(e), reflecting the equitable principles in which class actions are rooted, provides that the terms of all class action settlements be approved by the court. "A class action shall not be dismissed or compromised without the approval of the court . . . ." Fed. R. Civ. P. 23(e). This is to ensure that all members of the class are ade-

quately protected. *See Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971); C. Wright & A. Miller, *supra,* at § 1797. In asking the district court and this court to approve a waiver of attorney's fees as a consideration of a settlement solely because it was a term of the settlement, defendants ask the court to disregard the duty imposed by Rule 23. Indeed, plaintiffs' counsel in this case alerted defense counsel to that duty during the negotiations.

Courts have given particular attention to attorney's fees in class actions. Judges long have been concerned with protecting the class representatives who had benefited the entire class but had borne all of the expenses. As a matter of fairness, courts therefore have awarded attorney's fees in class actions under equitable principles, and as an exception to the general rule that attorney's fees are not available in the absence of contract or statute. *See Hall v. Cole,* 412 U.S. 1, 4-5, 93 S. Ct. 1943, 1945-46, 36 L. Ed. 2d 702 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92, 90 S. Ct. 616, 625, 24 L. Ed. 2d 593 (1970); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166-67, 59 S. Ct. 777, 781, 83 L. Ed. 1184 (1939); C. Wright & A. Miller, *supra,* § 1803.

Similar considerations have prompted courts to award attorney's fees in situations in which a private individual successfully acted as a "private attorney general," to vindicate an important public policy. The Supreme Court so held in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263 (1968) (per curiam), and this court so held in *Brandenburger,* 494 F.2d at 888-89. This court and other courts have held that attorney's fees may be awarded whether the plaintiff's law-

yer is privately retained counsel or, for example, a salaried employee of a public service organization. *Shadis v. Beal,* 685 F.2d 824, 830-31 (3d Cir.), *cert. denied,* 103 S. Ct. 300 (1982) (if legal service organizations could not receive fee awards, an important type of private attorneys general would be less willing to pursue public interest cases). *Brandenburger,* 494 F.2d at 889. Courts, accordingly, have long recognized the strong public policy considerations in favor of awarding attorney's fees in suits in which representative parties serve interests broader than their own self interest.

These considerations take on greater force in civil rights cases. The Congress expressed approval of attorney's fees awards in such cases when it passed 42 U.S.C. § 1988, in response to *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). In *Alyeska,* the Supreme Court had construed very narrowly federal courts' equitable powers to award attorney's fees in the absence of statutory authorization, 421 U.S. at 269, 95 S. Ct. at 1629 (Brennan, J. & Marshall, J., dissenting). Congress thereupon provided the statutory authorization by enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *See* S. Rep. No. 1011, 94th Congress, 2nd Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909. The Senate report specifically adopted the Supreme Court's pre-*Alyeska* language of *Piggie Park* to underline the important public policy served by attorney's fee awards in civil rights cases. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."

S. Rep., *supra*, at 5910 (quoting *Piggie Park*, 390 U.S. at 402). Therefore, a successful section 1983 claimant "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep., *supra*, at 5912 (quoting *Piggie Park*, 390 U.S. at 402). Thus, a district court is normally obliged to award fees to a successful section 1983 plaintiff, *Hensley v. Eckerhart*, 103 S. Ct. at 1937, and successful plaintiffs include those who have negotiated successful settlements. *Maher v. Gagne*, 448 U.S. at 129, 100 S. Ct. at 2575.

There is a special reason for the district court to scrutinize for fairness any provision for attorney's fees in a class action settlement. When attorney's fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers' interest in compensation and the class members' interest in relief. In the present case, the attorney was asked to choose between forgoing any compensation while obtaining a favorable settlement on behalf of the class, or declining the benefit for the class in hope of eventually receiving a fee award. Plaintiffs' attorney here accepted the benefit for the class and turned to the court for his own protection. In the more common situation, the reverse is true. The attorney negotiates the fee for himself, and members of the class seek court review because of actual or perceived unfairness to them. *See, e.g., Mendoza v. United States*, 623 F.2d at 1352-53. The conflict of interest underlying each situation, however, is similar.

The problem has led to discussion and scholarly debate. *See, e.g.*, Levin, *Practical, Ethical, and Legal Considerations Involved in the Settlement of Cases in which*

Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Rev. 515 (1980); Note, *Attorneys' Fees—Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action,* 51 Temple L.Q. 799 (1978); Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations,* 131 U. Penn. L. Rev. 793 (1983). One bar association has concluded that simultaneous negotiation of settlement and fees is unethical. New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 80-94, *reprinted in* 36 The Record of the Association of the Bar of the City of New York 507 (1981). The crux of the problem is the possibility of diverging interests of the lawyer and the class. The attorney may be tempted with a generous fee offer as *quid pro quo* for a less than optimal settlement. Alternatively, the defendant may condition settlement on the attorney's waiver of fees creating a particularly severe conflict when important interests of class members are at stake.

To avoid this conflict, this circuit has followed the seminal decision of the Third Circuit in *Prandini* and has disapproved simultaneous negotiation of settlements and attorney's fees. *Mendoza v. United States,* 623 F.2d at 1352-53. We did not there hold that stipulated attorney's fees in such cases were per se unacceptable. We stated that "we do not believe rejection of a resulting settlement in every case [of simultaneous negotiations] is appropriate." In *Mendoza,* we accepted the simultaneously negotiated stipulation for the payment of fees on a showing of unusual circumstances—which included the United States Department of Justice's participation, as an intervenor

representing the public interest, in the negotiations. This minimized the effect of conflict of interest on the settlement.

In this case, there were no such unsual circumstances. Attorney's fees should not have been a part of the settlement of the claims of the class. The historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court. Rather, the court should make its own determination of the fees that are reasonable, giving due consideration to the appropriate factors. *See Hensley v. Eckerhart*, 103 S. Ct. at 1937 n.3; *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838 (9th Cir. 1982); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

Reversed and remanded for determination of reasonable attorney's fees.

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1 Plaintiffs claimed that inadequate care contravenes the due process and equal protection provisions of the fifth and fourteenth amendments as well as the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982), the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461 (1982), the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982), Article X § 1 of the Idaho Constitution, and certain Idaho education and penal statutes.

JIM JONES
Attorney General
State of Idaho

P. MARK THOMPSON
Deputy Attorney General
Statehouse
Boise, Idaho 83720

JAMES WICKHAM
Deputy Attorney General
Health and Welfare Division
450 West State—10th Fl.
Boise, Idaho 83720
(208) 334-4006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., MINORS, individuaully and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK, and CARROLL ELMORE, individually and in their official capacities, their successors in office, title, and interests,

Defendants.

ORDER

(Filed October 22, 1984)

PURSUANT TO RULE 4(b), F.R.C.P., the period in which Defendants, John V. Evans, Rose Bowman (successor in office to Thomas L. Purce), George Bachik and William Gruzinski (successor in office to Carroll Elmore) shall respond to all matters which are now or may be

pending in this Court shall be tolled until the latter of expiration of ninety (90) days after 1) entry of the mandate herein by the United States Court of Appeals; 2) denial of said Defendants' Petition for Writ of Certiorari in the Supreme Court; 3) remand of the matter to this Court after action by the Supreme Court; or 4) denial of said Defendants' Motion to Rescind Tender of Settlement, should they elect to so move.

DATED this 22 day of October, 1984.

Honorable Marion J. Callister
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091
MJC

(District of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(Filed November 6, 1984)

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The Appellants' Second Emergency Motion for Stay for Injunction Pending Appeal is granted. The district court's order of October 22, 1984, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

(District of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(November 21, 1984)

Before: SCHROEDER, FARRIS and REINHARDT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

DC# CV 80-4091 MJC
Idaho (Pocatello)

JEFF D., PAUL E., JOHN M., and DUSTY R., etc.,
Plaintiffs-Appellants,
vs.
JOHN V. EVANS, etc., et al.,
Defendants-Appellees.

ORDER

(Filed Devember 6, 1984)

Before: SCHOEDER, FARRIS and REINHARDT, Circuit Judges.

The mandate in this case has issued. The motion for stay and the second petition for rehearing and suggestion for rehearing en banc are both denied as moot.